Supreme Court, U.S.
FILED
OCT 9 2001
OFFICE OF THE CLERK

No. 01-348

In the
SUPREME COURT OF THE UNITED STATES

JOE CARRABBA, JR., ET AL.,
Individually and on Behalf of
All Others Similarly Situated, *Petitioners*,

v.

RANDALLS FOOD MARKETS, INC., *Respondent*.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

WILLIAM WHITEHILL
(*Counsel of Record*)
ROBERT WRIGHT
STACY OBENHAUS
GARDERE WYNNE SEWELL LLP
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4761
(214) 999-3000
Counsel for Petitioners

TABLE OF CONTENTS

ARGUMENT 1

A. Randalls fails to refute the existence of a direct conflict among the circuits on an important point of federal law. 1

B. Randalls' brief illustrates the conflict that should be resolved by this Court 3

C. The petitioners' damage calculations do not produce unreasonable results. 5

CONCLUSION 7

TABLE OF AUTHORITIES

CASES: PAGE

Central States, Southeast and Southwest Areas Pension Fund v. Central Transport Inc.,

472 U.S. 559 (1985) 2

Northeast Department ILGWU Health & Welfare Fund v. Teamsters Local Union No. 529 Welfare Fund,

764 F.2d 147 (3d Cir. 1985) 1

STATUTES:

29 U.S.C. § 1132(a)(1)(B) 1

29 U.S.C. § 1140(a)(1)(D) 1

ARGUMENT

A. Randalls fails to refute the existence of a direct conflict among the circuits on an important point of federal law.

Petitioners submitted a single, straightforward issue:

> Where a court determines that an ERISA plan contains illegal terms, may that court nevertheless apply those illegal terms when determining a plan participant's claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B)?

Petitioners asked this Court to address this issue for two reasons. First, the Fifth Circuit's holding in this case conflicts with the Third Circuit's holding in *Northeast Department ILGWU Health & Welfare Fund v. Teamsters Local Union No. 529 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985) that, when determining a participant's claim for benefits under 29 U.S.C. § 1132(a)(1)(B), the court is required by 29 U.S.C. § 1140(a)(1)(D) to ignore illegal terms that would forfeit benefits otherwise promised under the plan's lawful terms. Second, the answer to this question is essential to the orderly administration of ERISA benefit plans. If, as the Fifth Circuit held, illegal forfeiture, non-accrual, or non-vesting terms are valid to defeat a claim under section 1132(a)(1)(B) to recover specific benefits stated in the plan documents, employers and practitioners need to know that so they can be sure to include such illegal terms in their plans and effectively eliminate the section 1132(a)(1)(B) remedy from ERISA. On the other hand, if as the Third Circuit held, illegal terms are void and the plan is construed in their absence, employers

and practitioners need to know that so they will establish and maintain their benefit plans according to the law.

The sole question currently before this Court is whether the circuits are split on a substantial issue under an important federal statute and whether the Fifth Circuit holding conflicts with principles this Court established in *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport Inc.*, 472 U.S. 559 (1985). Randalls does not dispute that ERISA is an important federal statute designed to protect American workers. And there are few issues more threatening to Congress's goals for ERISA than the premise that an employer can lawfully eliminate a claim under section 1132(a)(1)(B) by simply putting illegal terms in their plans. Moreover, Randalls does not dispute that the Third Circuit in *Northeast Department* held that section 1104(a)(1)(D) requires fiduciaries, like Randalls, when determining the amount due under a section 1132(a)(1)(B) claim for benefits, to ignore illegal terms in the plan and award the amount required under the plan's remaining lawful terms. Nor does Randalls contest that the MSP promises petitioners specific retirement benefits conditioned only on illegal forfeiture, non-accrual and non-vesting provisions. Finally, it is undisputed that the Fifth Circuit invoked illegal terms in the MSP to deny petitioners' section 1132(a)(1)(B) remedy.

Petitioners identified a direct conflict regarding the effect of illegal terms in an ERISA protected benefit plan. Instead of addressing that conflict, Randalls directs its response to issues that are not and will not be before this Court - attempts to justify the equitable relief awarded by the Fifth Circuit. By ignoring the true issues and focusing on

non-issues, Randalls tacitly concedes the conflict's existence and materiality.

ERISA provides and the Third Circuit holds that the courts should ignore a plan's illegal forfeiture conditions and should award the plan's otherwise unconditional benefits. The Fifth Circuit, however, holds that courts should enforce illegal forfeitures, deny a section 1132(a)(1)(B) remedy, and proceed to rewrite the plan under the guise of providing the participants "equitable" relief pursuant to section 1132(a)(3)(B). Thus, the question before this Court, and which Randalls' response fails to address, is which remedy ERISA requires. As this case graphically illustrates, the difference can dramatically affect the administration of ERISA plans. Therefore, resolving this issue would decide a substantial conflict regarding this important federal statute.

B. Randalls' brief illustrates the conflict that should be resolved by this Court.

Randalls' Brief in Opposition illustrates the importance of the conflict before the Court. Unable to find any authority to support using illegal terms to deny a claim for benefits, Randalls simply argues (without authority) that the illegal terms themselves (which it refers to as the "strict" or "literal" terms) preclude a claim for benefits. Randalls cites no authority holding that illegal terms can themselves preclude a claim under section 1132(a)(1)(B). Having assumed (without authority) that the illegal terms preclude such a remedy, Randalls turns to the merits of equitable relief. Randalls' arguments lack merit, but this is not the time to address them.

The important issue to be decided is the effect to be given to illegal forfeiture provisions in an ERISA protected plan. If employers are allowed to preclude claims for specific benefits by simply inserting illegal forfeiture provisions into ERISA plans, as the Fifth Circuit holds, the result is to allow employers to write the subsection 1132(a)(1)(B) remedy out of ERISA by adding illegal conditions to their plans and relegating employees to "equitable" relief under subsection 1132(a)(3)(B). If, on the other hand, illegal terms in ERISA plans are void, as the Third Circuit holds, petitioners have a subsection 1132(a)(1)(B) remedy that must be recognized. To say that petitioners have no claim for benefits because their ERISA plan contained illegal terms is to say that the illegal provisions will be enforced. If the law of the land is that claims for benefits can be defeated merely be inserting illegal provisions into ERISA plans, such a pronouncement should come in the form of an explanatory opinion from this Court, not a per curium affirmation of a district court memorandum opinion that itself lacks explanation on this point.

There is no merit to Randalls' attempt to minimize this issue's importance by arguing that this is the first reported case where section 1104(a)(1)(D) has been raised in a failed top hat plan case. The issue has broader ramifications for all cases where ERISA plans have illegal terms of any type. As the numerous cases petitioners cited in their petition demonstrate, section 1104(a)(1)(D) arises frequently in a variety of contexts. Yet only the Fifth Circuit holds that the section does not apply in the face of illegal plan provisions.

C. The petitioners' damage calculations do not produce unreasonable results.

Although the merits are not presently before the Court, there are three points that petitioners address briefly here to dispel the false impression Randalls attempts to create that petitioners seek unreasonable results.

One, Randalls suggests that the illegality with the MSP was that it had no ratable accrual and vesting schedules that satisfied ERISA. This is not true. The illegality was that the MSP provided for the complete non-accrual, non-vesting and forfeitability of benefits up to a participant's 65th birthday (Agreed Exhibit 3, ¶¶ 4.4, 4.5).

Two, petitioners do not ask for benefits that would have accrued to them after plan termination. Instead, the benefits petitioners seek in their section 1132(a)(1)(B) claim are the present value of the specific retirement benefits promised in their most recent plan agreements and benefit statements (Agreed Exhibit 138, Tab B). Randalls does not dispute that the MSP specified these benefits. Randalls even stipulated to the amounts (38 R. 3976-95). The present value of the participants' promised benefits is not the same thing as the benefits that would have accrued to them in the future, as Randalls' suggests. *See* Respondent's Brief at 15. Instead, the participants' stated benefits increased each year as their compensation grew (39 R. 9551). For example, Joe Carrabba was a MSP participant for its entire existence. In 1974, his MSP retirement benefits were $31,200 (Agreed Ex. 1). By 1992, those benefits had increased to $519,720 (39 R. 9381). At the same progression of benefit increases, Mr. Carrabba's retirement benefits would have increased to

$872,540 at age 65. Petitioners are not seeking $872,540 or even the present value of $872,540 for Mr. Carrabba. Rather, they are seeking the present value of the $519,720 less those amounts already paid to him at plan termination, for a net recovery of unpaid benefits of $186,887 (Agreed Ex. 183, Tab B). Petitioners do not, therefore, seek any benefits based on years not worked.

Three, Randalls' complaints that participants' stated benefit amounts are irrational because some younger employees have higher promised age 65 benefits than some older employees are unfounded. Randalls' Brief at 10. The participants' promised benefit amounts are a result of the plan's insurance driven nature, not any calculation by petitioners, as Randalls claims (39 R. 9551). Thus, any "irrational" results tied to the amount of promised benefits result from the benefit calculation method Randalls used in its "retirement insurance program" (Agreed Ex. 15). For example, Randalls complains that the $915,889 of promised benefits for Julie Embree (a 27 year old pharmacist) is unreasonable. It is, however, nothing more than the amount of her retirement benefit calculated by Randalls and stated on her most recent plan agreement, as Randalls stipulated (38 R. 9382). The differences in the promised retirement benefits are a function of each particular participant's salary and age (39 R. 9551). Moreover, petitioners made the present value calculation consistently for each participant thereby resulting in substantially smaller benefits due at plan termination for the younger employees (Agreed Ex. 138, Tab B).

CONCLUSION

Because the Fifth Circuit's holding conflicts with the Third Circuit's holding on this critical issue under an important federal statute – and violates critical ERISA principles this Court has affirmed – the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM WHITEHILL
(Counsel of Record)

ROBERT WRIGHT
STACY OBENHAUS
Gardere Wynne Sewell LLP
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4761
(214) 999-3000
COUNSEL FOR PETITIONERS

1061130v2